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No. 75-1366

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROY D. GARNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1975, and a petition for rehearing was denied on February 24, 1976. The petition for a writ of certiorari was filed on March 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain evidence introduced by the government at trial was obtained in violation of petitioner's statutory or constitutional rights and should therefore have been excluded.

2. Whether the indictment sufficiently apprised petitioner of the crime with which he was charged.

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343, and was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence at trial, which is not disputed, showed that petitioner engaged in a scheme to defraud the Bell Telephone Company of Nevada of monies due for long distance telephone calls by using an electronic device known as a "blue box."[1] In April 1974, Jack Covey, a security agent employed by the Pacific Telephone and Telegraph Company, concluded, based upon his analysis of a computer printout, that someone at petitioner's residence was using a blue box to make long distance calls free of charge (Tr. 35-39). On May 16, 1974, Covey placed a 2600 Hertz frequency detector on petitioner's telephone line, which confirmed that a blue box was being used (Tr. 45-47). On August 29, 1974, Covey placed two additional pieces of equipment on petitioner's line — a device, commonly referred to as a "pen register," to

[1]When attached to a telephone, a blue box permits the user to by-pass the telephone company's billing equipment on long distance calls and to complete such calls free of charge. To make a call with a blue box, the user dials either the universal number for directory assistance (555-1212) or a toll-free number (one beginning with 800). Once a connection has been achieved, the user pushes a button on the box, which in turn emits a 2600 single frequency Hertz tone, signifying that the calling party has hung up. The blue box permits the user to remain connected to the company's long-distance network, however, and by pushing other buttons, producing different frequency tones, the user can simulate dialing and call any number in the world free of charge (Tr. 12-24).

record on paper the date, time and telephone number dialed and a magnetic-tape voice recorder that, when triggered by the use of a blue box, would record the first two minutes of each illegal conversation (Tr. 49-50).

For the following four days, Covey recorded the first two minutes of 35 long-distance telephone calls placed, with the aid of a blue box, from petitioner's residence. In 18 instances, the persons called were identified. Petitioner identified himself as the caller in two instances.

After September 2, 1974, Covey removed the magnetic tape recorder from the line, but he allowed the pen register to operate until December 2, 1974 (Tr. 91). Meanwhile, on September 20, 1974, Covey informed the F.B.I. about his investigation and, at the F.B.I.'s request, turned over his file on the investigation (Tr. 91). Based upon this information, the F.B.I. subsequently obtained a search warrant for petitioner's residence. During the ensuing search, the blue box was discovered (Tr. 154). At petitioner's trial, the pen register records, portions of the voice recordings and the blue box were introduced into evidence.

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that since no federal court "authorized" the interception and divulgence of the substance of any of his telephone conversations, the admission at trial of evidence concerning certain of his telephone conversations violated federal law.

The pertinent provisions of 47 U.S.C. 605 — which govern the conduct of persons "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire * * *" — prohibit divulgence of the existence or contents of wire communications except (1) "through authorized channels of transmission or reception" or (2) "as authorized by

chapter 119, Title 18 [18 U.S.C. 2510-2520]." The complementary provisions of 18 U.S.C. 2517 permit the disclosure in court proceedings of evidence concerning the contents of wire communications obtained "by any means authorized by [chapter 119] * * *." One of the means of interception and disclosure specifically authorized by chapter 119 is through court order (18 U.S.C. 2516); but, as the phrase "by any means authorized" indicates, chapter 119 makes lawful as well other means of interception and disclosure. Specifically, 18 U.S.C. 2511(2)(a)(i) provides in pertinent part that:

> [i]t shall not be lawful under [chapter 119] for an * * * agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication * * *.

Nothing in chapter 119 supports petitioner's contention that—although "not * * * unlawful"—evidence resulting from the telephone company's interception of telephone calls placed by him with a blue box could not be admitted at trial because such conduct was not "authorized" by court order.[2] Indeed, petitioner's view of chapter 119 and of 47 U.S.C. 605, if accepted, would render

[2]In fact, 18 U.S.C. 2515 prohibits the admission into evidence at any trial, hearing or similar proceeding of any wire or oral communication only "if the disclosure of that information would be in violation of [chapter 119]." As noted, 18 U.S.C. 2511(2)(a)(i) specifically provides that interceptions by telephone company officials—such as those involved here—"shall not be unlawful under [chapter 119] * * *."

inadmissible in court proceedings not only communications intercepted by telephone company officials under 18 U.S.C. 2511(2)(a)(i) but also those consensual interceptions provided for under 18 U.S.C. 2511(c) and (d). See *United States* v. *White*, 401 U.S. 745, 752. In rejecting a claim similar to that made by petitioner, the Seventh Circuit recently stated in *United States* v. *Freeman*, 524 F.2d 337, 340, certiorari denied, February 23, 1976 (No. 75-5781):

> The government * * * contends that section 2511 (2)(a)(i) authorizes telephone companies to engage in limited surveillance to protect their property and to disclose information so secured to law enforcement authorities. While section 2511(2)(a)(i) may more properly be characterized as an exemption from the criminal penalties of 18 U.S.C. §2511(1) and the civil liabilities of 18 U.S.C. §2520, in view of Congress' expressed intent to permit telephone companies to engage in reasonable activities to protect their property, we agree that section 2511 (2)(a)(i) must sensibly be read as an exception of telephone companies from the relevant prohibitions of 47 U.S.C. §605, and, in a sense, as an authorization.[3]

[3]Petitioner's suggestion (Pet. 8) that "[t]here is an apparent facial conflict between [47 U.S.C. 605] and [18 U.S.C. 2511(2)(a)] in that the former statute purports to prohibit what the latter allows" is refuted by the legislative history of the Crime Control Act, from which Section 2511(2)(a) is derived. As the court concluded in *United States* v. *Freeman*, *supra*, 524 F. 2d at 340:

> The legislative history of the Crime Control Act indicates that Congress intended section 2511(2)(a) to reflect existing law which sanctioned the use of reasonable methods by telephone companies to protect their property. S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. Code Cong. & Admin. News, p. 2182, citing *United States* v. *Beckley*, 259 F. Supp. 567 (N.D. Ga. 1965). The Senate report, furthermore, paraphrases the first sentence of revised 47 U.S.C. §605 to read: "except as authorized or

2. Petitioner also contends (Pet. 15-17) that evidence resulting from the telephone company's investigation should have been suppressed because it was obtained in violation of state law. But even assuming that the company's conduct was contrary to state law,[4] the admissibility of the resulting evidence in the federal courts depended solely upon the status of the company's conduct under federal law. As the court of appeals correctly noted (Pet. App. A 2-3), "[i]f Congress intended that telephone companies be able to monitor phone lines when necessary to protect their rights or property, then state law is preempted, at least if it conflicts with the intent behind the federal statute." See *Ker* v. *California*, 374 U.S. 23, 31-32; *On Lee* v. *United States*, 343 U.S. 747, 754-755; *Olmstead* v. *United States*, 277 U.S. 438, 468; *United States* v. *Infelice*, 506 F. 3d 1358, 1365 (C.A. 7); *United States* v. *Keen*, 508 F. 2d 986, 989 (C.A. 9), certiorari denied, 421 U.S. 929; *United States* v. *Melancon*, 462 F. 2d 82, 92 (C.A. 5), certiorari denied, 409 U.S. 1038; *United States* v. *Sims*, 450 F. 2d 261, 262-263 (C.A. 4).

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permitted by chapter 119, title 18 * * *." *Id.* 2197. Since 18 U.S.C. §2511(2)(a)(i) permits the disclosure of intercepted communications, it cannot be doubted that Congress intended the statute as an exception to the prohibitions of revised 47 U.S.C. §605.

See also *United States* v. *Clegg*, 509 F. 2d 605, 611-612 (C.A. 5).

[4]While the California wire interception statute (Calif. Penal Code, Section 631 (1970)) does not contain a provision precisely equivalent to 18 U.S.C. 2511(2)(a)(i), it does permit telephone company officials to intercept wire communications for purposes, *inter alia*, related to the "conduct or operation of the services and facilities of such public utility" (Calif. Penal Code, §631[b]). It is not unreasonable to assume, and petitioner cites no California case suggesting the contrary, that the California courts would find that interception by telephone company officials of telephone calls placed by petitioner with a blue box related to the "conduct or operation" of the company's services and facilities and was therefore lawful.

3. Petitioner contends further (Pet. 17-19) that the telephone company acted unreasonably in leaving the pen register on his phone (although removing the Hertz detector and voice recording equipment) after it had "completed [its] investigation of possible fraud" and turned over its file to the FBI. But as the court of appeals properly concluded (Pet. App. A 3):

> The continued use of the pen register for a period of approximately 76 days after removal of the Hertz detector from [petitioner's] telephone line did not violate [petitioner's] Fourth Amendment rights and merely constituted a reasonable continuation of an ongoing investigation. The pen register merely recorded on a paper tape all numbers dialed from the telephone being monitored and did not in any way record the content of conversations. The investigation by the telephone company was a private, statutorily authorized one by an employee of a company protecting its property rights. Since the F.B.I. did not know that the company would intercept and record any portions of the calls, government action was absent.

Petitioner also appears to argue (Pet. 18) that as of September 20, 1974, federal authorities were "clearly implicated in the search" and, accordingly, were required to obtain a warrant before further use of the pen register by the telephone company.[5] The factual premise

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[5]It is settled that the use of a pen register does not entail an "aural acquisition" of communications under chapter 119 of Title 18, and is therefore not an "interception" for purposes of that chapter (see 18 U.S.C. 2510(4)). Consequently, "the permissibility of [the use of a pen register] by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment" (*United States* v. *Giordano*, 416 U.S. 505, 553-554; concurring and dissenting opinion of Mr. Justice Powell). We

of this argument is refuted by the evidence at trial, which showed that the FBI did not become aware of the continued use of the pen register until it was notified of that fact by the telephone company at the end of November, shortly before the device was removed (Tr. 158). Thus, the continuing investigation by the company remained "a private, statutorily authorized one by an employee of a company protecting its property rights * * * [and] government action was absent" (Pet. App. A 3).[6]

4. Finally, petitioner contends (Pet. 20) that the indictment did not provide him with sufficient notice of the crime of which he was accused because it charged only a scheme to defraud the telephone company by the use of a blue box but did not indicate the manner in which a blue box had been used to defraud the company. The use of a blue box, however, under the commonly understood and readily ascertainable meaning of that term as a

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submit, however, that it is by no means clear that the use of a pen register even constitutes a search within the meaning of the Fourth Amendment so that a search warrant would be required for its use by government officials. As the Fifth Circuit held in *United States* v. *Clegg*, *supra*, 509 F. 2d at 610, "[t]he Fourth Amendment * * * protects only the content of a telephone conversation and not the fact that a call was placed or that a particular number was dialed." Accord, *United States* v. *Baxter*, 492 F. 2d 150, 167 (C.A. 9). There is no need for this Court to address that issue here, however, since, as noted, the telephone company's use of a pen register in this case was, from beginning to end, neither at the behest nor with knowledge of government officials.

[6]Petitioner's reliance upon *Lustig* v. *United States*, 338 U.S. 74, is therefore misplaced. Unlike the situation presented in *Lustig*, the F.B.I. did not here either "actively participate in a search being conducted by" others or "stand by watching with approval as [a] search continue[d]." *United States* v. *Mekjian*, 505 F. 2d 1320, 1327 (C.A. 5); see 338 U.S. at 78.

device for bypassing the telephone company's billing procedures, itself constitutes a scheme to defraud; and the indictment in this case so stated by charging petitioner with a scheme to defraud the telephone company over a seven-month period "by depriving [it] o[f] moneys due and payable for long distance telephone calls through the use of an electronic device commonly referred to as a 'blue box' * * *." Moreover, at the pretrial hearing on petitioner's motion to suppress, his counsel demonstrated a complete understanding of the nature of the offense with which petitioner was charged (Tr. of February 14, 1975, pp. 24-27). Petitioner could have, had he deemed it necessary, sought additional detail regarding the alleged scheme by requesting a bill of particulars.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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